

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In re	)	
	)	
KSQA, L.L.C.	)	MB Docket No. 12-168
Licensee of Television Station	)	
KSQA, Channel 12	)	CSR-8659-M
For Carriage of KSQA(TV), Topeka,	)	
Kansas	)	

To: Office of the Secretary  
Attn.: Chief, Media Bureau

**REPLY**

**I. Introduction**

KSQA, L.L.C, licensee of commercial television station KSQA, Channel 12, Topeka, Kansas, by its attorneys, hereby files, pursuant to Sections 76.7 and 76.61 of the Commission's Rules, this Reply to the Opposition and Motion to Dismiss filed by Cox Cable Communications, Inc. ("Cox"), operator of a cable television system serving the community of Topeka, Kansas.<sup>1</sup>

In its Complaint for Carriage, KSQA submitted that it is being denied over-the-air channel carriage in violation of Sections 76.56 and 76.57 of the Commission's Rules. KSQA requested an order directing Cox to begin carrying KSQA on its over-the-air Channel 12 immediately. In its Opposition, Cox has failed to demonstrate a basis for dismissal or denial of the Complaint. Cox agreed in writing that it would not assert the timeliness argument it now puts forth as a basis

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<sup>1</sup> Pursuant to Sections 76.7(c)(3) and 1.4(h) of the Commission's Rules, KSQA calculates that this Reply was due to be filed on July 25, 2012. Due to work obligations at KSQA and at the law firm of undersigned counsel, KSQA was not able to file on the required date. KSQA, requests a brief two-day extension of time for the filing of this Reply so that it can be accepted as timely filed. The Reply contains information critical to a fair evaluation by the Bureau of the

for dismissal of the Complaint, and it is therefore barred from asserting timeliness as a basis for dismissal of the Complaint. In addition, the case precedent cited by Cox does not support Cox's request for denial of the Complaint.

## II. KSQA is Entitled to Mandatory Carriage on its Over-the-Air Channel 12

Cox attempts at great length to dispute the plain language of the Commission's

*Declaratory Order*.<sup>2</sup> However, the plain language quoted by KSQA cannot be ignored. It reads:

14. We clarify that the channel placement options in Sections 614(b)(6) and 615(g)(5) of the Act, as implemented in Section 76.57 of the Commission's Rules, remain in effect after the digital transition. **Section 614(b)(6) of the Act generally provides that commercial television stations carried pursuant to the mandatory carriage provision are entitled to be carried on a cable system on the same channel number on which the station broadcasts over-the-air. Under Section 615(g)(5) noncommercial television stations generally have the same right. The Act also permits commercial and noncommercial television stations to negotiate a mutually agreeable channel position with the cable operator. Historically, channel positioning has been part of the carriage election process, with must-carry stations choosing from among the statutory options as part of the must-carry election.**

15. **As noted above, one of those statutory options is carriage on the broadcast channel number. In digital broadcasting, a broadcast station's channel number is no longer identified by reference to its over-the-air radio frequency. Instead, in compliance with the ATSC standard, the station's "major channel number" is identified in its program and system information protocol ("PSIP"). This usually corresponds to the radio frequency at which the station previously broadcast its analog signal. Therefore, in the *First Report and Order*, the Commission required that channel mapping information be passed through as part of the PSIP, linking the digital channel number with the appropriate primary video and program-related content. Thus, the cable operator can identify the correct channel location by reference to the PSIP.**

16. We clarify that any station carried pursuant to mandatory carriage may

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issues raised in this proceeding, and KSQA submits that good cause exists for grant of the brief extension of time.

<sup>2</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, Declaratory Order*, 23 FCC Rcd 14254 (2008) ("*Declaratory Order*").

demand carriage on its major channel number as broadcast in the station's PSIP. We also clarify that although the *First Report and Order* did not specifically address the significance of the statutory provisions and rules with respect to the “historic” carriage options, these statutory options remain available to digital must-carry broadcasters, who will make digital channel placement elections pursuant to Sections 76.57(a) or (b) just as they previously have for analog channel placement elections. Section 76.57(c), adopted in the *First Report and Order*, should be read as clarifying the manner in which cable operators are to determine the channel number on which a local commercial or qualified NCE station is “broadcast over the air” when implementing such a station's election under Sections 76.57(a) or (b). The statute also permits carriage on “such other channel number as is mutually agreed upon by the station and the cable operator.” This negotiated option, as reflected in our Rules, also remains an option. We also note that Section 76.57(f) continues to apply to determine where a station must be carried if it makes no affirmative election. (Emphasis added, footnotes omitted)

Cox asserts that two Media Bureau decisions limit the clear meaning of this language.

However, in neither *ION Media*<sup>3</sup> nor *Channel 20 TV Co.*<sup>4</sup> did the Bureau address a fact situation similar to the facts before the Bureau in this case, and in neither case did the Bureau issue a decision that would support denial of KSQA’s carriage positioning complaint. In *ION Media*, the Bureau granted the must-carry requests of two television stations to be carried on their over-the-air analog channels. In *Channel 20 TV Co.*, the Bureau granted the must-carry complaint of a station for carriage on its major channel number. The Bureau granted mandatory carriage complaints in both of these cases, and neither case supports Cox’s position here. Moreover, in neither case did the Bureau address the question raised here, which is: where a new station goes on the air with a digital signal, may it elect mandatory carriage on its over-the-air channel?

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<sup>3</sup> *ION Media*, 24 FCC Rcd 2461 (Med. Bur. 2009).

<sup>4</sup> *Channel 20 TV Co.*, 25 FCC Rcd 2219 (Med. Bur. 2010).

KSQA has no former analog channel.<sup>5</sup> Therefore its only historic over-the-air channel number is Channel 12. The plain language of *Declaratory Order* states that the answer to this question is “yes.” The PSIP nomenclature was created to protect the historic carriage rights of stations that wanted to continue to benefit from the viewer recognition of their analog channel number, even if they broadcast on a different digital channel. The PSIP nomenclature was not created to eliminate the statutory right of a station to demand carriage on its over-the-air channel.

### **III. Cox Agreed to an Extension of Time for KSQA to File its Carriage Complaint**

Cox also seeks dismissal of the Complaint on alleged timeliness grounds. However, attached to this Reply, as Exhibit 1, is an email from Mr. Jay Allbaugh of Cox, in which Mr. Allbaugh assures Mr. Booker Wade, that “If there is any concern on your part about assuring you are not waiving any rights to filing a complaint after May 1, I can have our lawyer address that.” Also attached, as Exhibit 2 to this Reply, is a Supplemental Declaration from Booker Wade, in which Mr. Wade attests that he received the attached email from Mr. Allbaugh and that Mr. Allbaugh gave Mr. Wade similar assurances in a telephone conversation prior to sending the email. Mr. Wade attests that Mr. Allbaugh assured him that Cox would not assert that KSQA had waived its rights by filing after the date specified in the Commission’s rules. Mr. Wade attests:

KSQA owners were concerned that in not responding in writing to the requests for carriage that Cox may take the position that in not filing a complaint immediately, Cox would argue that KSQA LLC had waived its rights to carriage. He very specifically advised that Cox would not take such a position and that Cox fully intended to carry KSQA. On the same day, Mr. Allbaugh forwarded me an

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<sup>5</sup> KSQA has never operated on or had a construction permit or license for Channel 22. It is not clear why the Commission assigned KSQA PSIP Channel 22, and KSQA requests that its PSIP channel be reassigned to Channel 12.

electronic message confirming that Cox was aware of the May 1, 2012 deadline and would not claim a waiver.<sup>6</sup>

Cox and KSQA had a number of conversations and communications trying to amicably work out a carriage arrangement, and it is possible that Cox has forgotten this exchange. KSQA does not assert bad faith on Cox's part, however, it is clear that Cox cannot, after agreeing not to assert a lack of timeliness on the filing of a Complaint, now seek to have the Complaint dismissed on a lack of timeliness ground.

#### IV. Conclusion

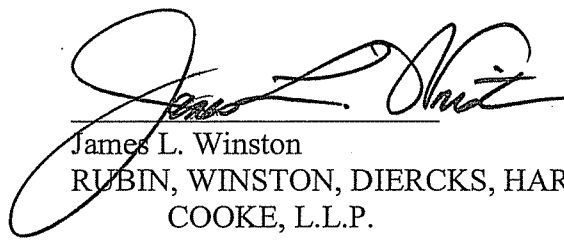
In its Complaint for Carriage, KSQA L.L.C demonstrated through the Declarations of Gregory Talley and Booker Wade and accompanying exhibits that Cox is unlawfully denying KSQA carriage on its over-the-air Channel 12. In addition, KSQA L.L.C. demonstrated that the purported legal basis for the denial of over-the-air carriage is a deceptively edited version of the Commission's *Declaratory Order*. Contrary to the distorted quotations from the Commission's *Declaratory Order* provided by Cox, it is clear that the Commission has ruled that KSQA is entitled to mandatory carriage on its over-the-air channel. KSQA, therefore, requests that the Commission deny Cox's Motion to Dismiss, and order Cox immediately to begin carriage of KSQA on its over-the-air Channel 12 as required by the Communications Act and the Commission's rules.

Respectfully submitted,

**KSQA, L.L.C.**  
By its attorneys

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<sup>6</sup> Exhibit 2.

A handwritten signature in black ink, appearing to read "James L. Winston", is positioned above the printed text. The signature is fluid and cursive, with a large initial "J" and a stylized "W".

James L. Winston  
RUBIN, WINSTON, DIERCKS, HARRIS &  
COOKE, L.L.P.

1201 Connecticut Avenue, N.W.  
Suite 200  
Washington, D.C. 20036  
(202) 861-0870  
jwinston@rwdhc.com

July 27, 2012

EXHIBIT 1  
JAY ALLBAUGH EMAIL

[Print](#) | [Close Window](#)

**Subject:** Phone message

**From:** "Allbaugh, Jay (CCI-Central Region)" <Jay.Allbaugh@cox.com>

**Date:** Thu, Apr 26, 2012 9:08 am

**To:** "booker@ksqa12.com" <booker@ksqa12.com>

Booker – We believe we have been working in good faith to get KSQA on but perhaps have not communicated as much as we could to clarify our intentions. As we discussed we are looking for a mutually agreeable channel position with channel 10 being the position I have in mind, a more favorable position for KSQA. Our technical team has also been actively trying to isolate the source of picture quality issues and requested today for me to facilitate a conversation with your engineer to get some tiling problems resolved before we launch in order to prevent a bad customer experience (in your best interest and ours). To this end, Vicki Marts in my shop has asked for the appropriate contact at KSQA.

You are correct that we will need to provide 30 days notice for launch of KSQA and repositioning of the other broadcast station that we are looking to move, so a May 1 launch is not realistic. Our lawyer has promised a response tomorrow on the requirements to move the other station, so that we can settle on a channel and start the notice process. Please know that we are not abdicating our responsibilities and reconsider your demand. If there is a concern on your part about assuring you are not waiving any rights to filing a complaint after May 1, I can have our lawyer address that. She understands that we are bumping up against some deadlines.

Regards,

Jay

**From:** [booker@ksqa12.com](mailto:booker@ksqa12.com) [mailto:booker@ksqa12.com]

**Sent:** Wednesday, April 25, 2012 03:22 PM

**To:** Allbaugh, Jay (CCI-Central Region)

**Cc:** [greg@ksqa12.com](mailto:greg@ksqa12.com) <greg@ksqa12.com>

**Subject:** RE: Fw: phone message

Jay,

It has been seven months since KSQA first sought carriage. The delays harms only KSQA and is not justified. KSQA now asks for on-channel carriage. KSQA asks that Cox provide the required 30-day notice and commence carriage of KSQA on or before May 1, 2012.

Booker



----- Original Message -----

Subject: Fw: phone message

From: "Allbaugh, Jay (CCI-Central Region)" <[Jay.Allbaugh@cox.com](mailto:Jay.Allbaugh@cox.com)>

Date: Mon, April 23, 2012 11:05 am

To: "'booker@KSQA12.com'" <[booker@KSQA12.com](mailto:booker@KSQA12.com)>

Booker- still on road but please know that I am awaiting my lawyers approval for us to move a certain broadcaster in order to provide the channel placement you had suggested during our last conversation. Should receive approval sometime this week.

Back to you shortly.

Jay

**From:** Allbaugh, Jay (CCI-Central Region)

**Sent:** Thursday, April 19, 2012 06:40 PM

**To:** [Booker@KSQA12.com](mailto:Booker@KSQA12.com) <[Booker@KSQA12.com](mailto:Booker@KSQA12.com)>

**Subject:** phone message

Booker –

Received you voice mail. I am traveling. It may be Monday before I can reach you.

Jay A.

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EXHIBIT 2  
BOOKER WADE SUPPLEMENTAL DECLARATION

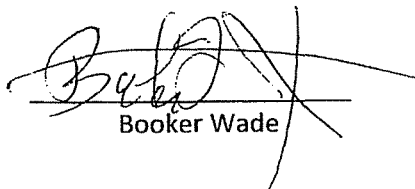
## Supplementary Declaration of Booker Wade

I, Booker Wade, declare as follows.

1. As a broadcast consultant for KSQA L.L.C., I had conversations with Jay Allbaugh, a management official for Cox Communications Kansas L.L.C., attempting to secure carriage of the signal of KSQA, Channel 12.
2. On or about April 26, 2012, in a telephone conversation with Mr. Allbaugh, he advised me that Cox had failed to respond to the written letters from KSQA LLC of September 28, 2011 and January 27, 2012, requesting carriage of the signal of KSQA because the letters were misdirected internally. He also advised that Cox did not intend the non-responses to be a denial of carriage and Cox would carry the signal as requested. I advised him that KSQA owners were concerned that in not responding in writing to the requests for carriage that Cox may take the position that in not filing a complaint immediately, Cox would argue that KSQA LLC had waived its rights to carriage. He very specifically advised that Cox would not take such a position and that Cox fully intended to carry KSQA. On the same day, Mr. Allbaugh forwarded me an electronic message confirming that Cox was aware of the May 1, 2012 deadline and would not claim a waiver. A copy of the message is detached. Ultimately, unable to agree on a mutually acceptable channel, by letter dated May 18, 2012, Cox denied carriage of KSQA.

I declare under penalty of perjury that the foregoing is true.

July 26, 2012

  
Booker Wade

**CERTIFICATE OF SERVICE**

I, Daniela Harris, a secretary in the law firm of Rubin, Winston, Diercks, Harris & Cooke, L.L.P., do hereby certify that on July 27, 2012, true copies of the foregoing "Reply" were mailed, first class U.S. mail, postage pre-paid to the following:

Cox Cable Communications, Inc.  
System Manager  
901 George Washington Boulevard  
Wichita, KS 67211

KTKA  
General Manager  
6835 NW Highway 24  
Topeka, KS 66618

Gary S. Lutzker, Esq.  
Dow Lohnes PLLC  
1200 New Hampshire Avenue, N.W.  
Suite 800  
Washington, D.C. 20036-6802

KTMJ-CA  
General Manager  
6835 NW Highway 24  
Topeka, KS 66618

City Manager  
City of Topeka  
City Hall  
215 SE 7<sup>th</sup> Street  
Topeka, KS 66603-3914

KTWU  
General Manager  
1700 College  
Topeka, KS 66621-1100

WIBW  
General Manager  
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General Manager  
6835 NW Highway 24  
Topeka, KS 66618

  
Daniela Harris